Filed 2/15/05 Estate of Volpi CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

Estate of MARINA SORIANI VOLPI, Deceased.	
EDWARD L. FANUCCHI, as Executor, etc., Petitioner and Appellant, v. RON EICHMAN et al., Claimants and Respondents.	F046093 (Super. Ct. No. 02CEPR00095) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Jane A. Cardoza, Judge.

Quinlan, Kershaw & Fanucchi, Rene F. Zuzuarregui; and Michael Carrigan for Petitioner and Appellant.

No appearance for Claimants and Respondents.

-ooOoo-

The primary issue on appeal in this case is whether the probate court erred in its interpretation of the decedent's will. We find it did, and reverse.

FACTUAL AND PROCEDURAL HISTORY

Edward L. Fanucchi brings this appeal as executor and personal representative of the estate of Marina Soriani Volpi, who died testate on January 4, 2002.[1] In March of 2002, Mrs. Volpi's will was admitted to probate. In the will, Mrs. Volpi made specific bequests to Saint Mary's Catholic Church, The Sisters Pious Disciples of the Divine Master of Fresno, and two of her sisters. The residue of her estate she left to certain of her nieces and nephews. In addition to these specific bequests, Mrs. Volpi's will granted a power of appointment to Fanucchi, "to give and bequeath an amount, up to $100,000.00, to any person(s)/entity(ies), except himself or his relatives by blood or marriage, who have demonstrated special effort in their affection toward me, toward my care and well-being, and toward my happiness."

In November of 2003, Fanucchi filed a petition for final distribution. The petition sought authorization for, as relevant here: disbursement of $767,500 to 12 persons and entities pursuant to the power of appointment; administration costs of $3,679.49; $1,600 for a trust appraisal; $3,000 in funeral and meeting expenses; and $2,000 in future expenses for travel to Italy. The petition was served on all the beneficiaries. In response to questions from the probate examiner's office, Fanucchi filed a declaration on January 30, 2004, explaining portions of the proposed distribution.

At the February 2, 2004, distribution hearing the probate court raised various concerns about the proposed distribution. With respect to the power of appointment, the court stated it believed the "literal reading" of the power of appointment would limit the power to "one total amount of 100,000" as opposed to Fanucchi's reading of the power of appointment, which was "one hundred [thousand] to any number of people each." The court directed Fanucchi to file a declaration and points and authorities supporting his request to distribute under the power of appointment amounts greater than $100,000 total.

---

[1] Fanucchi has standing to bring this appeal as executor of Mrs. Volpi's estate. (*O'Flaherty v. Belgum* (2004) 115 Cal.App.4th 1044, 1095.)

On April 1, 2004, Fanucchi filed a response to the issues raised by the court at the February 2 hearing. Fanucchi's declaration explained:

> "4. In 1999, MARINA SORIANI VOLPI, then age 81 and while in Italy, wanted to change her Will. She asked [Fanucchi] to draft a Will which would contain a clause allowing him to decide, in his total and unfettered discretion, who deserved to specially inherit from her, i.e., as to charities, among her seventeen nieces and nephews, and others. She wanted him to use a power of appointment to give an amount of money, up to $100,000.00 each, to those people or entities who provided her with attention, care, and happiness in her last years. [Fanucchi], then her attorney, so drafted her last will with language that emphasizes that the amount up to $100,000.00 could be given by him to any person or entity. He did not draft the language as written to mean that the total amount of special gifts could not exceed $100,000.00, among all the special heirs. She was very specific by insisting that those nieces and nephews who cared less for her were to be given less than the more caring ones. This created two classes of beneficiaries—one class of special heirs under the power of appointment, and one class of residual heirs."

At an April 5, 2004, hearing the court sought clarification on additional expenses requested in the distribution, but sought no further information regarding the power of appointment. The matter was taken under submission on April 15, 2004, and the court issued its written order on May 18, 2004. With respect to the power of appointment, the trial court's order stated:

> "The will also contained a power of appointment, giving Mr. Fanucchi 'the power to give and bequeath an amount, up to $100,000.00, to any person(s)/entity(ies), except himself or his relatives by blood or marriage, who have demonstrated special effort in their affection toward me, toward my care and well-being, and toward my happiness.' Mr. Fanucchi, as Executor of the Estate, has interpreted this provision to allow him to give up to $100,000.00 to as many people or entities as he determines appropriate.
>
> "The Court interprets the provision to allow only one sum of up to $100,000.00 to be subject to the power of appointment. This conclusion arises, not only from the plain language of the will, but also from the fact that Mrs. Volpi named the charities to whom she wished to give money in her will. She bequeathed $25,000.00 to the Sisters Pious Disciples of the Divine Master, Fresno, CA. The executor, via his power of appointment, seeks to give the same beneficiary an additional $100,000.00. Two

charities that were not named in the will, Boys Town of Italy and the Fresno Grand Opera, were also proposed beneficiaries of $100,000.00 each under the power of appointment.

"Declarations by the executor in support of his proposed gifts state that Mrs. Volpi was a frequent contributor to the Fresno Grand Opera during her lifetime, yet she did not name them [*sic*] in her will.

For the foregoing reasons, the court finds that the executor may bequeath up to a total sum of $100,000.00 under his power of appointment. Therefore, the proposed distributions to the residual beneficiaries must be adjusted. Petitioner may retain the sum of $100,000 for distribution pursuant to the power of appointment, and must account to the court for said distributions in a supplemental account within six months of the date of this order."

The trial court denied Fanucchi's subsequent request for reconsideration, concluding it was without jurisdiction to reconsider the order.[2] Fanucchi timely appeals the May 18, 2004, order.

DISCUSSION

Fanucchi contends in this appeal that the trial court erred in its interpretation of Mrs. Volpi's will. Specifically, Fanucchi contends the power of appointment was ambiguous, requiring the trial court to look to extrinsic evidence to determine the testator's intent. Fanucchi also contends the court should reconsider its order with respect to certain costs and expenses. We agree with Fanucchi.

"In reviewing a trial court's construction of a will, we are free to independently interpret the instrument as a matter of law *unless* the trial court's interpretation turned upon the credibility of extrinsic evidence or required resolution of a conflict in the evidence. [Citations.] 'The possibility that conflicting inferences can be drawn from uncontroverted evidence does not relieve the appellate court of its duty independently to interpret the instrument; it is only when the issue turns upon the credibility of extrinsic evidence, or requires resolution of a conflict in that evidence,

---

[2]Because we reverse the trial court's May 18, 2004, order, the question of whether the court properly denied the motion for reconsideration on jurisdictional grounds is moot. We note, however, that the motion for reconsideration did present new facts at least with respect to disallowed expenditures that had never before been questioned.

that the trial court['s] determination is binding.' [Citation.]" (*Estate of Verdisson* (1992) 4 Cal.App.4th 1127, 1135-1136.)

In exercising our independent duty to interpret a will, we consider that "[a] will must be construed according to the intention of the testator as expressed therein, and this intention must be given effect if possible." (*Estate of Stadler* (1960) 177 Cal.App.2d 709, 711.) Stated another way, "'"The paramount rule in the construction of wills, to which all other rules must yield, is that a will is to be construed according to the intention of the testator as expressed therein, and this intention must be given effect as far as possible."' [Citation.]" (*Estate of Verdisson*, *supra*, 4 Cal.App.4th at p. 1135; *Estate of Goyette* (2004) 123 Cal.App.4th 67, 70-71.) To this end, Probate Code section 21122 states, "The words of an instrument are to be given their ordinary and grammatical meaning unless the intention to use them in another sense is clear and their intended meaning can be ascertained."

In this case, the trial court apparently believed the "ordinary and grammatical meaning" of the language in the will required it to limit the power of attorney to a total amount of $100,000. The trial court's reading of the language ignores, however, the ambiguity in the language used. The power of appointment gave Fanucchi the power to "give and bequeath an amount, up to $100,000.00, to any person(s)/entity(ies) …." This phrase is inherently ambiguous. While "*an* amount" seems to imply one total amount of $100,000, "*any* person(s)/entity(ies)" can indicate up to $100,000 *per* person or entity, since "any" can have the same meaning as "every" or "all." (See Merriam-Webster's Collegiate Dict. (10th ed. 2001) p. 53.) Thus, the instrument can be read to mean, "one total amount of $100,000.00 divided amongst persons or entities" (how the trial court interpreted it) or, as "an amount, up to $100,000.00 each, to persons or entities" (Fanucchi's interpretation). Accordingly, the will is ambiguous and the court erred in

concluding the proposed distribution conflicted with the "plain language" of the instrument.[3]

When the meaning of a will is uncertain, the intent must be ascertained from the words used and the circumstances surrounding execution of the will. (*Estate of Russell* (1968) 69 Cal.2d 200, 205-206; *Estate of Lindner* (1978) 85 Cal.App.3d 219, 225-226.) When the words used are uncertain or ambiguous, extrinsic evidence may be considered in order to ascertain the testamentary intention. (*Ibid*.; Prob. Code, § 6111.5.) Such extrinsic evidence is admissible both to show that ambiguity exists and to resolve the ambiguity. (*Estate of Taff* (1976) 63 Cal.App.3d 319, 324-325 [extrinsic evidence admissible to show and resolve ambiguity in the use of the descriptive term "heirs"]; see also *Estate of Flint* (1972) 25 Cal.App.3d 945, 954.) Thus, the trial court here should have considered extrinsic evidence not only to determine the meaning of the ambiguous language, but also to determine *whether* there was an ambiguity in the language to begin with. (See, e.g., *Estate of Lindner*, *supra*, at p. 226 [noting that, with respect to technical meaning of words used in a will, testamentary language is an aid in interpretation "not a tool by which the court frustrates the testator's objectives"].)

The evidence presented by Fanucchi with respect to the ambiguity in the will and the testator's intent was uncontroverted. While a reasonable factual determination based upon extrinsic evidence will not be disturbed on appeal, when such evidence is uncontroverted and presents no issue of credibility, it is our duty, as the reviewing court, to independently interpret the written instrument itself. (*Estate of Black* (1962) 211 Cal.App.2d 75, 84; *Estate of Dodge* (1971) 6 Cal.3d 311, 318; *Parsons v. Bristol Development Co*. (1965) 62 Cal.2d 861, 865-866.) As previously set forth, our primary purpose in will interpretation is establishing the testator's intent.

---

[3]The court also relied on the fact Mrs. Volpi had "named the charities to whom she wished to give money in her will." The very purpose of a power of appointment, however, is to give the appointee discretion to make additional distributions, so we find the court's reliance on this fact unpersuasive.

In response to the trial court's concerns regarding the power of appointment provision, Fanucchi filed two separate declarations explaining that Mrs. Volpi's intent by including the power of appointment was to give an amount of money, up to $100,000 *each*, to those who gave her attention, care and happiness in her last years. She desired, apparently, that those in her life who gave her more attention receive more from her estate, and that the converse also be true. Because the residue of her estate was to be divided among certain nieces and nephews, those who were not beneficiaries under the power of appointment would receive a smaller inheritance as a result of the use of Fanucchi's use of the power of appointment, consistent with Mrs. Volpi's apparent intent. Additionally, as pointed out by Fanucchi, the tax consequences of the court's proposed distribution further support Fanucchi's position that Mrs. Volpi would not have intended the distribution proposed by the court. Without the proposed donations under the power of appointment, the estate will apparently incur greater tax liability than there are reserves to pay it. The trial court previously determined that Mrs. Volpi's intent with respect to taxes was that "the estate taxes should be paid from the residue of the estate," but failed to recognize the adverse consequences of the proposed distribution that eliminated the donations.

In sum, we find that the will is ambiguous with respect to the amount of money to be distributed under the power of appointment. However, the extrinsic evidence offered by Fanucchi (and uncontradicted by any heirs, all of whom were noticed of the proposed distribution) indicates a clear intent by the testator to allow Fanucchi to distribute up to $100,000 per person or entity, not $100,000 in the aggregate. Accordingly, we will reverse the order of the trial court.

Because we find the trial court erred in its interpretation of the will, we need not reach the issues of whether the heirs consented to the proposed disbursement or whether the trial court erred in its determination that it lacked jurisdiction to reconsider its decision.

Ruling on Miscellaneous Costs and Disbursements

Fanucchi further contends the trial court abused its discretion in the determination of costs. The trial court "offset" the request for costs of $3,089.56 due to its belief that other expenses sought were not accounted for. However, Fanucchi contends the court had never previously sought explanation for the $1,600 appraisal, the record shows that the $2,000 reimbursement for future travel expenses check was never cashed, and the $3,000 in "unexplained travel expenses" had already been reimbursed to the estate. Because we are already vacating the trial court's May 18, 2004, order, we direct the court on remand to reconsider its ruling with respect to the miscellaneous costs and disbursements previously disallowed in light of the evidence provided in Fanucchi's motion for reconsideration.

DISPOSITION

The trial court's finding and order are reversed. The trial court is instructed to issue a new order authorizing the distributions as requested by Fanucchi pursuant to the power of appointment, and to reconsider the costs and expenses disallowed in the May 18, 2004, order. Fanucchi shall recover his costs on appeal, to be paid from the assets of the estate. (Prob. Code, § 1002.)

_____

DAWSON, J.

WE CONCUR:

_____

WISEMAN, Acting P.J.

_____

CORNELL, J.